
A COVID Conundrum: Can Employers Require Employees to Vaccinate?

Gray Reed Legal Alert

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[CLICK HERE FOR AN UPDATED ALERT SUMMARIZING THE EEOC'S GUIDANCE ON COVID-19 VACCINATIONS.](#)

Recently, pharmaceutical companies Pfizer, Moderna and AstraZeneca each announced [promising findings](#) from their ongoing COVID-19 vaccine trials. All vaccines are subject to review by the FDA before receiving approval for distribution, and even on an accelerated timeline, it will take several months for the FDA to complete its review and for manufacturers and distributors to ramp up production to meet global demand. In the meantime, what does the development of a COVID-19 vaccine mean for employers?

Can Employers Require Employees to be Vaccinated?

Although the EEOC has not addressed this question with respect to COVID-19, its 2009 [guidance](#) released in response to H1N1 explained that employers *may* require employees to be vaccinated. However, under the Americans with Disabilities Act (ADA) and Title VII, employees with qualifying medical conditions or religious beliefs may be entitled to an accommodation and exempted from mandatory vaccinations.

Under the ADA, an employee seeking an accommodation for medical reasons must establish a covered disability for which a reasonable accommodation exists. But even employees with a covered disability may not qualify for an accommodation if working unvaccinated would constitute a “direct threat.” The ADA defines a [direct threat](#) as a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated by reasonable accommodation. Notably, the EEOC acknowledges that the current COVID-19 pandemic meets the direct threat standard of the ADA, opening the door for employers to impose medical inquiries and controls that might ordinarily be prohibited. Additionally, working unvaccinated cannot be a reasonable accommodation where it would create an “undue hardship” for the employer. [Undue hardships](#) under the ADA can be evaluated by considering: the nature and cost of the accommodation, the overall financial resources of the facility making the accommodation, the number of persons employed at the facility, the type of operation of the employer, and the impact of the accommodation on the operation of the facility. For example, an employer might be able to show an undue hardship where an unvaccinated employee would work in a confined space with others or have direct interaction in close physical proximity with customers or vendors.

Likewise, under Title VII, an employee may be entitled to an exemption from mandatory vaccinations due to a sincerely held religious belief. However, similar to the ADA analysis, an employer is not required to accommodate the employee if the accommodation would result in “undue hardship.” Under Title VII, an employer may find an undue hardship if the accommodation poses “more than *de minimis*” costs or burdens on the employer—a much lower standard than an undue hardship analysis under the ADA. Employers can evaluate [undue hardship](#) under Title VII by considering: identifiable cost in relation to the size and operating costs of the employer, the number of individuals who will need a particular accommodation, diminished efficiency and impact on workplace safety.

Next Steps for Employers

While looking forward to the prospect of a more immunized workforce, employers must consider numerous factors in developing a strategy for addressing COVID-19 vaccinations. Employers can educate employees about the benefits of vaccination, provide on-site vaccinations, and cover some or all of the cost of vaccination in order to encourage voluntary vaccination without implementing a mandate. Current guidance suggests that employers mandating vaccination must provide reasonable accommodations for employees who refuse the vaccine due to disability or sincerely held religious beliefs, barring undue hardship. Employers should continue to adhere to [CDC protocols](#) as well as state and local guidance regarding best practices in order to provide a safe and healthy workplace.

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